Masalam Sdn Bhd v Ngah bin Embong & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-443 OF 1995
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
25 MARCH 1997

Land Law *— Sale of land — Common mistake — Whether there was any evidence of common mistake — Whether defence that the plaintiffs had breached the agreement resulting in its lawful termination was consistent with the defence case of common mistake*

The respondent ('the plaintiffs') claimed against the appellants — a housing developer ('the developer') — for specific performance of an agreement dated 14 September 1992 ('the agreement') relating to a sale of a shophouse. The agreement showed that the sale price of the shophouse was RM240,350. The developer alleged that the price was a genuine common mistake on the ground that an employee of the developer, one Thean Lip Chong, had earlier shown the plaintiffs a price list stating that the price of the lot was actually RM411,386.73. The plaintiffs denied this and said that they were shown another price list upon which they relied which stated that the price was RM240,350. The developer alleged that their solicitor had earlier notified the plaintiffs of the mistake by way of a letter dated 28 October 1992 ('the purported letter') sent to the plaintiffs by AR registered post. The plaintiffs, however, denied ever receiving this letter. The defence was that the plaintiffs had breached the agreement by failing to make the instalments on time resulting in its lawful termination by the developer. The developer also counterclaimed for damages for non-performance and a declaration that the agreement had been lawfully terminated. The High Court granted the plaintiffs' application. The developer appealed.

Held, dismissing the appeal:

(1) In view of the disputed allegations, it was imperative for the developer to produce the best evidence to support the claim of a common mistake. However, their solicitors did not file any affidavit by Thean Lip Chong or the person who entered the sale price in the agreement, or even the purported AR card to support the allegation that the purported letter was in fact sent. Indeed, the maker of the purported letter also did not give evidence in the court below. In short, there was no evidence whatsoever as to why RM240,350 was entered into the agreement by the person who did so nor was there any evidence of common mistake. It is not enough to say it is a mistake. The person who made the mistake should explain how the mistake occurred (see pp 472I and 473C–E).

(2) The defence that the plaintiffs had breached the agreement by failing to make the instalments on time resulting in its lawful termination by the developer was totally inconsistent with the

basis on which the developer chose to contest the plaintiffs' claim or to conduct this appeal. Since their case was common mistake, their remedy was rectification (see p 473E–F).

[Bahasa Malaysia summary

Penentang ('plaintif-plaintif') membuat tuntutan terhadap perayu-perayu — pemaju perumahan ('pemaju') — untuk pelaksanaan spesifik suatu perjanjian bertarikh 14 September 1992 ('perjanjian tersebut') yang berkaitan dengan jualan sebuah rumah kedai. Perjanjian tersebut menunjukkan bahawa harga jualan rumah kedai itu adalah RM240,350. Pemaju mengatakan bahawa harga itu merupakan suatu kesilapan bersama tulen atas alasan bahawa seorang pekerja pemaju, seorang bernama Thean Lip Chong, lebih awal telah menunjukkan kepada plaintif-plaintif senarai harga yang menyatakan bahawa harga lot sebenarnya RM411,386.73. Plaintif-plaintif menafikannya dan mengatakan bahawa mereka ditunjukkan satu lagi senarai harga yang menyatakan bahawa harga adalah RM240,350. Pemaju mengatakan bahawa peguamcara mereka telah lebih awal memaklumkan kesilapan itu kepada plaintif-plaintif menerusi surat bertarikh 28 Oktober 1992 ('surat yang dikatakan') yang dihantar kepada plaintif-plaintif oleh pos berdaftar AR. Namun demikian, plaintif-plaintif menyangkal pernah menerima surat ini. Pembelaan adalah bahawa plaintif-plaintif telah memungkir perjanjian tersebut dengan kegagalan untuk membuat bayaran ansuran menepati masa yang mengakibatkan penamatan yang sah oleh pemaju. Pemaju juga menuntut balas ganti rugi untuk ketidakpelaksanaan dan untuk perisytiharan bahawa perjanjian tersebut telah ditamatkan secara sah. Mahkamah Tinggi membenarkan permohonan plaintif-plaintif. Pemaju merayu.

Diputuskan, menolak rayuan:

(1) Memandangkan pengataan-pengataan yang dipertikaikan, adalah imperatif untuk pemaju mengemukakan keterangan yang terbaik untuk menyokong tuntutan kesilapan bersama. Namun demikian, peguamcara mereka tidak memfailkan apa-apa afidavit oleh Thean Lip Chong atau orang yang memasukkan harga jualan dalam perjanjian tersebut, atau pun kad AR bagi menyokong pengataan bahawa surat yang dikatakan memang telah dihantar. Malah, pembuat surat yang dikatakan juga tidak memberi keterangan di mahkamah bawah. Secara ringkas, tiada apa keterangan sama sekali tentang mengapakah RM240,350 dimasukkan ke dalam perjanjian tersebut oleh orang yang berbuat demikian dan tidak juga terdapat apa-apa keterangan tentang kesilapan bersama. Adalah tidak memadai untuk mengatakan bahawa ia merupakan satu kesilapan. Orang yang melakukan kesilapan harus menjelaskan bagaimana kesilapan berlaku (lihat ms 472I dan 473C–E).

(2) Pembelaan bahawa plaintif-plaintif telah memungkir perjanjian tersebut dengan kegagalan untuk membuat bayaran ansuran menepati masa yang mengakibatkan penamatan yang sah oleh

pemaju adalah tidak konsisten pada keseluruhannya dengan dasar atas mana pemaju memilih untuk mencabar tuntutan plaintif-plaintif atau untuk menjalankan rayuan ini. Oleh kerana kes mereka adalah kesilapan bersama, remedi mereka adalah pembetulan (lihat ms 473E–F).]

Notes

For a case on common mistake, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) para 2510.

Legislation referred to

Rules of the High Court 1980 O 81

Appeal from: Civil Suit No 22–87 of 1994 (High Court, Shah Alam)

VS Viswanathan (*TH Su & Co*) for the appellant.
Ashok K Raman (*Abu Talib Sharom & Zahari*) for the respondent.

Mahadev Shankar JCA (delivering judgment of the court): This is an appeal from a judgment granting the plaintiffs specific performance of an agreement relating to the sale of a shophouse.

The facts are adequately set out in the judgment of James Foong J, and do not need to be repeated here.

The only ground advanced in this appeal was that there was a genuine common mistake as to the purchase price and that severe hardship has been caused to the appellant by the grant of summary relief to the plaintiffs under O 81 of the Rules of the High Court 1980.

The whole basis for claiming that there was a genuine common mistake was an allegation by the developer that before the sale and purchase agreement was executed on 14 September 1992, an employee of the developer by the name of Thean Lip Chong had shown the plaintiffs a price list stating that the price of the lot was RM411,386.73 (see appeal record p 84 para 7). (Affidavit of Lee Teong Chye dated 22 August 1994.)

The plaintiffs categorically denied this in the reply affidavit dated 7 September 1994 (see appeal record p 95 para 6).

Notwithstanding the allegation, the fact remains that before the sale and purchase agreement was signed, the first payment by way of deposit on 4 August 1992 (appeal record p 133), the second payment on 27 August 1992 (appeal record p 134) and the third payment on 3 September 1992 all came up to 10% of RM240,350 which was the sale price in the said agreement (appeal record p 113 cl 2 and p 126). This is a very formal agreement and there was no evidence whatsoever as to why RM240,350 was entered into the said agreement *by the person who did so*. It is not enough to say it is a mistake. The person who made the mistake should explain how the mistake occurred.

A The agreement is dated 14 September 1992. The very first time an allegation of a mistake took place is in a letter by the developer's solicitor purportedly dated 28 October 1992 and purportedly sent by AR registered post. The plaintiffs denied ever receiving this letter. The copy in the appeal record was not the document sent to the plaintiffs but to the developer B (appeal record p 141). The plaintiffs' solicitors saw this document for the first time on 11 January 1993.

In the course of the affidavits filed, the developer's representative claimed that the plaintiffs were shown a price list stating the lot cost RM411,386.73. The plaintiffs denied this and said they were shown another price list upon which they relied which stated that the price was C RM240,350.

The hearing took place on 20 March 1995. In view of the disputed allegations, it was imperative for the developer to produce the best evidence to support the claim of a common mistake. But their solicitors did not file any affidavit by Thean Lip Chong or the person who entered the sale price D in the agreement, or even the purported AR card to support the allegation that the purported letter of 28 October 1992 was in fact sent. Indeed, it seems the developer changed its solicitors and the maker of this purported letter of the 28 October 1992 also did not give evidence in the court below. In short, we hold that there is no evidence of common mistake.

E The claim was for specific performance. The defence was that the plaintiffs had breached the agreement by failing to make the instalments on time resulting in its lawful termination by the developer. There was a counterclaim for damages for non-performance and a declaration that the agreement had been lawfully terminated.

F This is totally inconsistent with the basis on which the developer chose to contest the plaintiffs' claim or to conduct this appeal. Since their case was common mistake, their remedy was rectification. Indeed, after the dispute flared up, the developer's solicitors wrote on 3 November 1993 to the plaintiffs' solicitors that they would file for rectification (appeal record p 159). They changed their minds on 19 November 1993 (appeal record G p 236). The plaintiffs filed a caveat and initiated this action on 22 February 1994.

For the reasons stated, we upheld the judgment of the court below.

We dismissed this appeal with costs without calling upon the respondents' counsel to address us. With respect to the appellant's counsel, H we found his submissions devoid of any merit. We have also ordered that the deposit made by the appellant be paid out to the respondents to account of their taxed costs.

Appeal dismissed.

I Reported by Loo Lai Mee